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THE RESPONSIBILITY OF PERSONS CAUSING DEBTOR'S INSOLVENCY IN THE BILL ON PRE-INSOLVENCY AND INSOLVENCY PROCEEDINGS

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Abstract

Insolvency is the state of the debtor's patrimony characterized by insufficient monetary funds available for the payment of exigible debts. It may be the consequence of unfavourable economic circumstances, but also the result of managerial deficiencies of even fraud.

If insolvency is caused by the gross incompetence or the fraud of the debtor's board of directors, then the syndic judge, by means of the special mechanism created in the insolvency proceedings, i.e. the joint responsibility action, may include the responsibility of the debtor's managers (if the debtor is a legal person) in covering the debtor's liabilities. From a psychological point of view, such a menacing perspective may bring about a certain control of the managerial activity, a certain caution of a *bonus pater familias* in managing the debtor's affairs¹.

Keywords: Insolvency, imposition of responsibility, managing board, Bill on Pre-insolvency and Insolvency Proceedings

1. Regulations of the responsibility of the managing authorities

The core of the matter is to be found in Chapter IV of Law no. 85/2006 art.138- 142. The bill on the pre-insolvency and insolvency proceedings refers to this matter in Title II, Section VIII, articles 169 – 173. The future law does not essentially alter the lawmaker's conception on this institution, but it does amend certain issues occurring in practice. The present paper does not aim at an exhaustive analysis of the institution of the responsibility pertaining to the managing board of the debtor as legal person, but at underlining the differences between the present regulations and the future law.

First, the position of the dispositions regulating the responsibility suit is worth mentioning. Both in the text of Law no. 64/1995, and the text of Law no. 85/2006, the chapter devoted to the responsibility of the debtor's managing board is situated immediately after the section regulating the termination of the proceedings. This arrangement has given rise to a diversity of precedents. Certain judges identified a legal reason to tackle this issue after closing the proceedings², others gave a decision before closing the proceedings, and some other magistrates who, although notified before the closing proceedings, decided to separately record and decide on the case, suspending proceedings until the final solution³.

¹ Piperea, Ghe., *Insolvența: legea, regulile, realitatea*, Wolters Kluwer, Bucharest, 2008, p. 727.

² Sentence no. 61 of 9 January 2005 of the Sibiu Court, quoted by Turcu, I., *Legea procedurii insolvenței, comentariu pe articole*, 4th edition, C.H.Beck Publishing House, Bucharest, 2012, p. 654.

³ Sent. No. 410 of 23 April 2005 of the Botoșani Court, quoted by Turcu, I., *Legea ... op. cit.*, p. 654.

The doctrine has rightly pointed out⁴ that the closure of the insolvency proceedings settles the responsibility suit, even if it was registered and left unsolved, as the debtor ceased to exist as a legal person, being radiated, the syndic judge and the liquidator are disinvested, and the creditors' committee is dissolved.

In order to provide a unitary view of legal practice, the Bill on Pre-Insolvency and Insolvency Proceedings places the dispositions referring to the imposition of legal responsibility on the managing board before those referring to the closure of the insolvency proceedings.

2. Legal nature

Another issue, which the Bill on Pre-Insolvency and Insolvency Proceedings unfortunately leaves unsolved, is the legal nature of the responsibility suit. Regarding this aspect, there have been many doctrinarian debates ending in placing the judicial nature of this suit either in the sphere of tort law⁵, or contractual liability⁶, or, as the case may be, tort or contractual law, according to the source of the legal breach⁷.

Similarly, specialised literature⁸ also supports the organic theory, according to which the members of the supervision/managing board are not subjects of law distinct from society, and their power does not derive from the constitutive act, but the Law, as it regulates their prerogatives and duties, and their liability can only be subject to tort law.

The analysis of the legal nature regulated by the Law no. 85/2006 on insolvency proceedings, resumed by the Bill, reveals that it is a special tort liability, with all the consequences arising from this qualification, which contains elements seen as derogatory to the common law of tort liability. As this is tort liability, the requirements of imposing responsibility pertain to common law.

3. Individuals entitled to submit the legal request of imposing patrimonial liability

The initiators of liability suits may be: the legal trustee/ liquidator, the President of the creditors' committee as a result of the decision of the Creditors Assembly, or, in case this committee has not been assembled, the creditor nominated by the creditors' assembly. Similarly, legal action may be taken in the same conditions by the creditor who owns more than 50% of the arrears in the total debt.

Exerting his attributions, the liquidator performs a detailed analysis of the debtor's assets and liabilities, as well as the associated documentation, in order to find the causes and circumstances leading to the state of insolvency, mentioning the individuals who may be held liable for this state, and the existence of the premises for imposing their responsibility, according to art. 138 in the Law. He is entitled to decide if the management was at fault and if there are persons whose activity contributed to the company becoming insolvent, in the sense of art. 138.

The different content of alin.1 of art.138 in the Law as compared to alin.1 of art. 169 in the Bill leads to the conclusion that the insolvency expert is no longer constrained by indicating the liable persons in reporting the causes of the liability suit. This reformulation of

⁴ Piperea, Ghe., op. cit., p.741.

⁵ Piperea, Ghe., op. cit., p. 737, I. Adam, C. N. Savu, *Legea procedurii insolvenței. Comentarii și explicații*, C.H.Beck Publishing House, Bucharest, 2006, p. 776, decision no. 1317/2003 of the Bucharest Court of Appeal, in Curtea de Apel București, *Practică judiciară comercială pe anii 2003 – 2004*, p. 328.

⁶ Șcheaua, M., *Răspunderea civilă a membrilor organelor de conducere ale societăților comerciale reglementată de Legea no. 85/2006*, in *Pandectele Române*, no. 2/2006, p. 144, Bufan, R., *Aspecte ale răspunderii juridice conținute în Legea no. 64/1995 privind reorganizarea judiciară și lichidare*, in the *Annals of the University of Timișoara*, 1998, p. 405.

⁷ Turcu, I., *Law ... op. cit.*, p. 664.

⁸ See: Baiaș, F., David, S., *Răspunderea civilă a administratorilor societăților comerciale*, in "Dreptul" no. 8/1992, p. 21; Pătulea, V., *Răspunderea juridică a organelor de conducere administrare și control ale societăților comerciale cu capital de stat*, in "Dreptul" no. 1/1996, p. 15.

the text is therefore useful, in our opinion, as it aimed at eliminating the existing constraints, since in practice certain liable aspects of the activity of the former management is apparent after the expiry of the report submission date, the delay being sometimes due to the difficult access to financial information and accounting reports.

A peculiar aspect of the insolvency proceedings, introduced by Law no. 169/2010 is the possibility of the disposition in art. 138 alin. 6, according to which, “in the case of a decision to dismiss the case introduced on the basis of alin. 1 or, if it is the case, alin. 3, the legal trustee/liquidator not intending to appeal will notify the creditors about his intent. If the general assembly or the creditor who owns more than half the value of all the outstanding debts decides that an appeal is in order, the legal trustee should resort to it, according to the law”.

The first issue evinced in the doctrine is the legal liquidator’s apparent suppression of the possibility to appeal, the law referring only to the legal trustee. We agree to the opinion that this is a mere inconsistency in the text of the law, as both the liquidator and the legal trustee may appeal, taking into account the destination of the amounts received from the decision to impose the responsibility, as well as the inadmissibility of the ongoing suit quality in the appeal according to the stage of the insolvency suit.

Additional issues stemming from the adoption of this legislation refer to forcing the insolvency expert to appeal against his will and respectively taking over the proceedings when the appeal was introduced by the president of the creditors’ assembly, another entitled creditor or the main creditor. In regard to the fact that filing an action on the grounds of art. 138 alin. 1 forbids the creditors from instituting legal proceedings according to alin. 3 in the same article of the law, it is our opinion that obliging the legal expert to appeal when the liability suit was brought by him is a beneficial legal innovation, aimed at subjecting his activity to the creditors’ control.

Nevertheless, obliging the insolvency expert to appeal against the lack of relief in imposing patrimonial responsibility when he has considered that the suit is not advisable and considering that the main party will be entitled to appeal is an objectionable legislative solution whose adoption will not protect the creditors’ interests, which would be better defended if they brought the case to court themselves.

This issue also finds a solution in the Bill which, in art.169 alin.6 states that, in case the creditors’ assembly or the creditor owning more than half the financial claims decide that an appeal is in order, the case will be appealed by the president of the creditors’ committee or the main creditor, as the case may be.

4. Conditions of responsibility

4.1. Persons responsible for driving the company into insolvency

In order to coerce these persons into accepting the patrimonial responsibility of a part of the debtor’s liabilities, it is necessary to prove the main requirement, i.e. that the person in question was a member of the supervision or management board in the company, followed by the probation of one of the commissive or omissive acts mentioned in the special law on the matter.

The persons who may be held liable for driving the company into insolvency may be:

- a. The debtor’s trustees, acting individually or as part of an administrative board, according to the attributions of representation and operation, according to art. 70 and 71 in Law no. 31/1990, republished.
- b. The debtor’s CEOs by virtue of their attributions of operating the company, according to art. 152 in the Law no. 31/1990, republished, although a contrary convention may exist and their term derives from an employment contract.
- c. The debtor’s censors who, although not part of the management proper, are entitled to supervise the administration, to check the company books, and to unannouncedly control the management of the company liquidities, according to art. 163 in the Law no. 31/1990, republished.

- d. Any other person who has contributed by committing the acts sanctioned by the law to the debtor's cessation of payments – for example the actual manager who is involved in activities specific to the offices of management and control, but without abiding by the formal requirements stipulated by statute for this particular position.

The doctrine⁹ states that the rightful trustee is the individual who has been officially vested, like social administrators, the president – general manager, their deputies, the managers of the groups of economic interest, the presidents, vice-presidents and members of committees or managing boards of associations.

On the contrary, specialized literature¹⁰ states that the rightful trustee¹¹ is considered to be the trustee whose office has been revoked, with or without recording it in the register of companies, if he continued performing acts specific to this position, such as signing contracts or payment instruments etc.¹². Similarly, it is our opinion that the rightful trustee is also the social administrator who, although not legally vested — for instance, his appointment was not recorded in the register of companies¹³ – but he has exerted attributions specific to the company management, and who is included by his acts in what is expressly and limitatively stated in art. 138 alin. 1 lit. a - g in the Law has caused the state of insolvency of the debtor legal person¹⁴.

The Bill introduces an element of novelty, sanctioning the liable person who, as a result of the responsibility suit, may not be appointed as trustee or, if he is the trustee of other societies, he will be retrograded for a period of 10 years since the date of the final ruling. The novelty is radical, as it is applicable not only to the members of the statutory management committee, but also to other persons, including the rightful trustee.

Art. 169 alin.8 in the Bill states that the decision that the syndic judge gave in order to impose the patrimonial responsibility of the statutory trustee will be automatically communicated to the National Office of the Register of Companies (ONRC). It is our opinion that in view of a fair application of the dispositions of art. 169 alin.7, this notification has to be effected not only for statutory trustees, but also for any party involved in patrimonial responsibility.

⁹ See Turcu, I., *Falimentul. Actuala procedură. Tratat*, 5th edition, completed and upgraded, Lumina Lex Publishing House, Bucharest, 2005, p. 471.

¹⁰ Pașca, V., *Falimentul fraudulos. Răspundere și sancțiuni*, Lumina Lex Publishing House, Bucharest, 2005, p. 101.

¹¹ He is assimilated to the rightful trustee and the main associate who, by their resolutions, decisively influenced the company activity, performing certain operations included in the acts expressly and limitatively stated by art. 138 alin. 1 lit. a - g in the Law (ibidem, pp. 101 - 102).

¹² In this respect, legal practice states that it is impossible to exclude the responsibility of the actual trustee, the son of the sole associate who continued the company operations after his father's death, but it goes without saying that his responsibility is conditioned by the probation of the acts expressly and limitatively stated in the law in regard to creating such a responsibility (the Timiș Court, resolution no. 9713 of 18 September 2003, ibidem, p. 102). Is our opinion that this solution remains up to date in the light of the new insolvency law, the text of art. 138 being not very different from the former art. 137 in Law no. 64/1995.

¹³ In legal practice, it was accurately stated that it is illegal to decide the dismissal of a case because it was brought against a person without passive quality, as long as the office of the register of companies contained no mention of the conveyance of debts and the cessation of the quality of trustee, since according to art. 5 in Law no. 26/1990 (republished) mentions are opposable to third parties since the date of their inclusion in the register of companies or their publication in the Official Monitor of Romania or another publication (according to statutory provisions). Taking into account these issues, the appellate court decided to quench the decision and send the case back to the syndic judge as he had given a solution without studying the root of the matter (the Bucharest Court of Appeal, common sitting 6, Decision no. 301/R/2005, in I. I. Dolache, C. H. Mihăianu, op. cit., pp. 283 - 284).

¹⁴ See also the Decision no. 5104/2004 of the Cluj Court of Appeal, S. com., in Turcu, I., *Falimentul. Actuala procedură...*, cit. supra, p. 474.

4.2. Damage

The patrimonial responsibility under discussion presupposes the existence of a tort in the patrimony of the insolvent debtor's creditors. The tort inflicted on the creditors is represented by their impossibility to recover the outstanding debts because the members of the supervision/managing boards or any other party has caused the state of insolvency, so that the debtor could no longer settle his debts by means of the funds available. We consider that the responsible persons are to be compelled to compensate for a part of the company liabilities, not because they have caused the damage to the creditors, but because their acts brought the debtor into an insolvency state. Therefore, it has been stated¹⁵ that in the special case of tort liability, regulated by art. 138 in the Law, the damage consists of the liabilities of the insolvent debtor.

Specialized literature¹⁶ considers that the fact that the lawmaker uses the formulation "... a part of the debtor's liabilities ..." does not automatically mean that the syndic judge has to oblige the responsible persons to pay only a part of the company liabilities, as they may be forced to pay for the liabilities in their entirety. All the more, another view expressed in specialized literature¹⁷ soundly considers that the statute under analysis should not be interpreted in the sense that the persons having committed the illegal acts who have driven the debtor into insolvency could not repay the outstanding debts in their entirety, but in the sense that each of these liable persons may be individually obliged to do so when their contribution is different and may be accurately determined.

The Bill sanctions these opinions by unequivocally stating in art. 169 alin.1 that the liable individuals may be obliged to recover "the outstanding financial prejudice of the debtor legal person, who is in an insolvency state, without exceeding the prejudice in direct connection to the tortious act".

4.3. The tortious act

In connection to the tortious act, both the doctrine¹⁸ and legal practice¹⁹ consider that the enumeration in art. 138 alin. (1) has a limitative character, expressly and exclusively stating the categories of tortious acts resulting in creating liability for the members of the management of the insolvent legal person and/or other individuals contributing to driving the legal person into insolvency.

Thus, claims were dismissed if based on factual grounds like: lack of due diligence in bringing certain goods back to the debtor's patrimony²⁰, lack of recording the debts to the state budget in the company books²¹, faulty management²², not following through with recovering the company's own debts²³, the cession of shares, etc.

Art. 169 alin.1 in the Bill nevertheless adds to the torts already sanctioned by the regulations in force "any other intentional act contributing to the debtor's present state of insolvency, as established according to the present law".

In this respect, it is to be remarked that the enumerative and limitative character of the statute is modified, but the responsibility of the members of the management boards is better evinced as a special type of tort liability.

It is to be noted that the members of the managing boards are not responsible for their mere managerial inability, but for the commission of illegal acts whose purpose usually is the misapplication of company funds and the study of personal or third parties' interests, so that

¹⁵ Adam, I., Savu, C. N., op. cit, pag. 26.

¹⁶ Pașca, V., op. cit., p. 104.

¹⁷ Turcu, I., *Falimentul. Actuala procedură...*, cit. supra, p. 475.

¹⁸ Turcu, I., Law... op. cit., p.664, Piperea, Ghe., op. cit., p. 742.

¹⁹ Decision no. 4547 of 28 September 2004 of the Cluj Court of Appeal.

²⁰ Decision no. 13 of 13 January 2005 of the Suceava Court of Appeal.

²¹ Decision no. 100 of 9 February 2005 of the Timișoara Court of Appeal.

²² Decision no. 19 of 20 January 2005 of the Suceava Court of Appeal.

²³ Sentence no. 18 of 24 January 2005 of the Galați Court.

in practice this form of responsibility tends to be seen as tortious in all circumstances. Also, if the illegal act caused damages which are too small as compared to the debtor's turnover, and the time elapsed since that moment is long enough to allow the assessment that it bore no influence on the initiation of the insolvency proceedings, there is no question of the members of the managing board to be held responsible from a patrimonial point of view.

Alternately, one may resort to the form of general tort liability, according to Law no. 31/1990. The legal trustee/liquidator will also examine the causality relation between the alleged act committed by the member of the debtor's managing board and the state of insolvency that the debtor is presently in. The responsibility is created not only when the commission of the act constituted a determining condition for the insolvency state of the debtor, but also when it was only an enabling condition.

4.4. The causality connection

The patrimonial responsibility of the members of the managing board and/or other individuals having contributed to the insolvency of the legal person may not be engaged unless there is a causality relation between the tort committed by the persons under investigation and the damage caused, i.e. driving the company into insolvency.

As a result, all the acts performed/committed by the members of the managing boards and/ or any other person whereby they "contributed" to the legal person's reaching the state of insolvency, without regard to their being a direct cause of the damage or just enabling the commission of the illegal act, are susceptible to result in the punishment stipulated in art. 138 alin. (1), all the more that the term in the statute is "to contribute" and not "to cause" [insolvency].

In case the responsibility claim is admitted, the decision given by the syndic judge must mention the persons who may be held liable for the legal person's insolvency, the facts determining/ concurring and/or contributing to the state of insolvency, as well as the degree (percentile) to which the liable persons will be obliged to recover the damage caused and partially or totally repay the outstanding debts.

5. Conclusions

The analysis of the statutes on imposing the responsibility of the debtor's managing board reveals that the future regulation mainly resumes the legal dispositions in force, preserving the legal aspect of this institution and benefiting from the previous experience in point of doctrine and case law.

The amendments pertaining to the substance of the matter only refer to the loss of the constraining character of the acts constituting the grounds for the involvement of responsibility and the 10-year interdiction to be appointed as trustee applied to the individuals found liable.

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